In the Supreme Court of the United States

OCTOBER TERM, 1970

DENNIS HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion and order of the district court denying the motion for a preliminary injunction (Pet. App. A5–A21) are reported at 309 F. Supp. 468. The opinion and order of the district court dismissing the complaint (Pet. App. A22–A23) are not officially reported. The opinion of the court of appeals (Pet. App. A4) is reported at 429 F. 2d 427.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3) was entered on September 22, 1970. The petition for a writ of certiorari was filed on November 25, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

412-540—70

QUESTION PRESENTED

Whether the prohibition of Section 7421(a) of the Internal Revenue Code of 1954 against a suit to enjoin collection of taxes is applicable, in the circumstances of this case, to a wagering tax assessment.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in the petition at pp. 5-8.

STATEMENT

On January 2, 1969 the Government filed an assessment against petitioner pursuant to Section 4401 of the Internal Revenue Code of 1954 in the amount of $385,491.71 for unpaid wagering excise taxes accruing during the period July 1, 1961 to May 21, 1965. Since petitioner had failed to maintain any records of his wagering activities, as required by Section 4403 of the Code, the Government calculated the tax assessment on the basis of a projection. (Pet. App. A5–A6.)

The only available figures were taken from wagering records in the form of policy slips for the period May 19–21, 1965, which had been seized pursuant to search warrants issued on May 21, 1965.[1] The average daily receipts for this three-day period were projected over the four-year period (excluding Sundays and holidays) during which petitioner admitted that he had been accepting wagers. This process resulted in projected gross receipts of $2,883,955, upon which

[1] Petitioner also had been arrested and convicted for dealing in policy slips on four occasions, July 22, 1957, September 16, 1959, November 10, 1959, and May 21, 1965 (Pet. App. A18).

there was assessed an excise tax of 10 percent pursuant to Section 4401, resulting in a total assessment of $385,482.25 (tax plus interest). (Pet. App. A-6.)

Petitioner brought the present suit to enjoin the Government from collecting the wagering tax assessment. The district court denied the motion for a preliminary injunction (Pet. App. A5–A21) and dismissed the suit for a permanent injunction on the ground that it lacked jurisdiction over the subject matter (Pet. App. A22–A23). The court of appeals affirmed *per curiam* (Pet App. A4).

ARGUMENT

1. Section 7421(a) of the Internal Revenue Code of 1954 provides, with certain exceptions not here applicable, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, this Court recognized that Section 7421(a) is designed to restrict federal court jurisdiction to suits for refund, thereby assuring prompt collection of revenues. The Court further noted an exception to the general prohibition of Section 7421(a) where it is apparent that, under the most liberal view of the law and facts, the government can not establish its claim, and where no adequate legal remedy exists so that equity jurisdiction may be properly invoked (370 U.S. at 6–7). The courts below correctly determined that in the present case petitioner failed to satisfy these requirements.

2. Petitioner alleges (Pet. 14–19) that the excise tax on wagering is unconstitutional and thus uncollectible, citing *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. But neither these decisions nor those of any other federal court support this proposition.[2] On the contrary, it was said in *Grosso* (390 U.S. at 69–70, n. 7):

> We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax.

See also *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), petition for certiorari pending, No. 11, this Term; *Bowers* v. *United States*, 423 F. 2d 1207 (C.A. 5.)

Nor is there, as petitioner suggests (Pet. 16–17), a conflict between the present case and *United States* v. *United States Coin & Currency In The Amount of $8,674.00*, 393 F. 2d 499 (C.A. 7), No. 5, this Term, argued on October 20, 1970. The Seventh Circuit there likened a forfeiture proceeding to the criminal sanctions barred by *Marchetti* and *Grosso*. By contrast, the single issue here is enforcement of a purely *civil* tax liability, imposed by a lawfully enacted and, as

[2] The cases to which petitioner directs attention (Pet. 15 n. **) provide no support for petitioner's assertion. In each case, a criminal prosecution (or, in the two forfeitures cases cited, governmental action deemed equivalent to criminal punishment) was involved; the quoted language was in every instance mere dictum.

Grosso holds, constitutional statute. In these circumstances, the *Marchetti-Grosso* rationale is plainly inapplicable.

3. Petitioner raises (Pet. 19–24) similar constitutional arguments against the manner in which the government calculated his tax liability. It is urged (Pet. 21) that since petitioner could not be compelled to disclose his records, "[t]he Government's arbitrary assessment * * * effectively punished petitioner for exercising his Fifth Amendment right in refusing to come forward with any such records." Again petitioner's arguments are bottomed on *Marchetti-Grosso*—and, as noted above, those decisions are not applicable to the assessment and collection of a *civil* tax liability, as here. As the district court, following a careful analysis, concluded (Pet. App. A9–A13), petitioner's assertions do not establish that the government cannot ultimately prevail, as must be shown for injunctive relief.

4. Finally, since a suit for refund constitutes an adequate remedy at law (*Flora* v. *United States*, 362 U.S. 145), petitioner cannot satisfy the second requirement of *Williams Packing*. And petitioner need not, as he suggests (Pet. 12, n.*), pay the full assessment to challenge his liability. Because the excise tax is imposed separately on each transaction or event, "the taxpayer has the opportunity to test his liability by paying the tax on one wager, filing a claim for refund, 26 U.S.C. § 7422, and, if denied, suing to recover same." *Vuin* v. *Burton*, 327 F. 2d 967, 970 (C.A.

6). See also *Flora* v. *United States*, *supra*, 362 U.S. at 175, n. 38; *Jones* v. *Fox*, 162 F. Supp. 439 (D. Md.). And, of course, at the refund trial, petitioner may challenge the means by which the government calculated his tax liability. Petitioner's remedy, quite simply, is a refund suit, and the injunctive relief here sought was properly denied.[1]

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted.

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[1] As the district court noted (Pet. App. A15), petitioner here is not "faced with an impermissible choice in violation of his Fifth Amendment rights" in presenting evidence to support his refund claim, since he can avoid any possible criminal prosecution by delaying presenting his evidence until criminal prosecution is barred by limitations.

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